Firearms Primer

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FIREARMS PRIMER

The purpose of this Primer is to provide a general overview of the major statutes, sentencing guidelines, issues, and case law relating to firearms offenses and enhancements for possession or use of firearms related to other offenses.

I. Relevant Statutes

A. Substantive Offenses

i. Firearms Transfer Offenses: 18 U.S.C. §§ 922(a)(6) ("straw purchase"), 922(d) ("prohibited person"), and 924(a)(1)(A) ("false statement in a record"):

Section 922(a)(6) makes it unlawful for any person in connection with the acquisition, or attempt to acquire, any firearm or ammunition from a licensed dealer to knowingly make any false oral or written statement intended or likely to deceive the dealer with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under any provision of 18 U.S.C. §§ 921 *et seq*. *A violation of section 922(a)(6) is punishable by a statutory maximum term of imprisonment of ten years*.

Section 922(d) makes it unlawful for any person to sell or dispose of any firearm or ammunition to any person knowing or having reason to believe that such person meets any of nine enumerated circumstances, summarized as follows:

(1) is under indictment or been convicted of a felony;
(2) is a fugitive from justice;
(3) abuses any controlled substance;
(4) been adjudicated as suffering from mental health issues;
(5) an (A) illegal alien or (B) an alien admitted under a non-immigrant visa;[1]
(6) dishonorably discharged from the Armed Forces;
(7) renounced his or her United States citizenship;

[1] The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is charged with promulgating regulations pertaining to § 922. Where the statute is silent as to the meaning of a term, a court will defer to the ATF's regulations at 27 C.F.R § 478 *et seq*. *See, e.g.*, *United States v. Anaya-Acosta*, 629 F.3d 1091, 1094 (9th Cir. 2011) (using the meaning of "illegally or unlawfully in the United States" at 27 C.F.R. § 478.11 to interpret § 922(g)(5)(A)).

(8) is subject to a restraining court order prohibiting harassing, stalking, or threatening an intimate partner or child; or
(9) been convicted of a misdemeanor crime of domestic violence.

A violation of section 922(d) is punishable by a statutory maximum term of imprisonment of ten years.

Section 924(a)(1)(A) makes it unlawful to knowingly make any false statement or representation with respect to the information required by the provisions of 18 U.S.C. § 921 *et seq*. to be kept in the records of a person licensed under the same said provisions or in applying for any license or exemption or relief from disability under those same provisions. *A violation of section 924(a)(1)(A) is punishable by a statutory maximum term of imprisonment of five years.*

The **guideline** applicable to §§ 922(a)(1), 922(d), and 924(a)(1)(A) offenses is **§2K2.1** (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). *See* USSG Appendix A (Statutory Index).

Issue: When 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A) are charged:

Some overlap appears to exist with the conduct covered under the three offenses. The following discussion includes examples of case law where a particular statute is charged. False statements on ATF Form 4473 - Firearms Transaction Record, the form required to lawfully transfer (*i.e.*, buy) a firearm from a federally licensed dealer, will trigger prosecution.[2] A common offense charged under section 922(a)(6) is the "straw purchase," which entails a material misrepresentation as to the identity of the actual firearm purchaser.[3] *See, e.g., United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010) ("[W]e find the act of falsifying the identity of the 'actual buyer' on Form 4473 to be a violation of § 922(a)(6)"); *United*

[2] *See United States v. Banks*, 514 F.3d 769, 778 (8th Cir. 2008) ("Unlike other businesses, a firearms dealer is required to record all of its sales on Form 4473. [*See*] 27 C.F.R. § 478.124(a).")

[3] *See* ATF Form 4473, Question 11.a. ("**Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you."**).

States v. Blake, 394 F.3d 1089, 1090 (8th Cir. 2005) (purchasing firearms on behalf of another for "some quick money" is a "straw purchase"); *United States v. Ortiz*, 318 F.3d 1030, 1037 (11th Cir. 2003) ("'straw purchases' equally misrepresent the identity of the purchaser in a firearm sale and violate 18 U.S.C. § 922(a)(6)" and occur when an unlawful purchaser uses a lawful "straw man" purchaser to obtain a firearm). Although frequently charged in such cases, section 922(a)(6) on its face does not prohibit straw purchases, *see United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997), and section 924(a)(1)(A) may be charged instead, *see United States v. Wilson*, 175 F. App'x 294 (11th Cir. 2006) (per curium) (finding that falsely claiming on Form 4473 to be the actual purchaser of the firearm is a violation of section 924(a)(1)(A)).

In 2011, subsections (a)(4)(B) and (a)(6) at §2K2.1 were amended to increase penalties for a defendant who is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.[4] The amendment ensures that defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) receive the same punishment as defendants convicted under 18 U.S.C. § 922(d) when the conduct is similar. In addition, the amendment provided a new Application Note 15 stating that, in a case in which the defendant is convicted under any of the three statutes, a downward departure may be warranted if (A) none of the enhancements in subsection (b) of §2K2.1 apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense. A defendant meeting these criteria is generally less culpable than the typical straw purchaser.

The firearm purchaser's place of residence is a material fact; an incorrect street address on Form 4473 is a section 922(a)(6) violation. *See, e.g., United States v. Queen*, 408 F.3d 337, 338-39 (7th Cir. 2005) (stating a false address is a material misrepresentation and a violation of section 922 (a)(6)); *United States v. Crandall*, 453 F.2d 1216 (1st Cir. 1972) (same); *United States v. Gudger*, 472 F.2d 566 (5th Cir. 1972) (same); *United States v. Behenna*, 552 F.2d 573, 575-76 (4th Cir. 1977) (same); *United States v. Buck*, 548 F.2d 871, 876 (9th Cir. 1977) (same).

[4] *See* USSG App. C, Amend. 753 (Effective Date: November 1, 2011).

Note also that the defendant's intent may also be a factor considered when charging section 922(a)(6) because it is a general intent crime and therefore the government is relieved from proving that the defendant specifically intended to violate a federal law. *See, e.g*, *United States v. Edgerton*, 510 F.3d 54, 57 (1st Cir. 2007) ("Section 922(a)(6) . . . does not presuppose deceptive intent or even knowledge that one's conduct is unlawful"); *United States v. Elias*, 937 F.2d 1514, 1518 (10th Cir. 1991) ("the phrase 'likely to deceive' in section 922(a)(6) does not establish a specific intent element but only requires proof the defendant imparted false information with the general intention of deceiving or being likely to deceive the dealer").

Violations of section 922(d) occur when a prohibited person acquires a firearm or when a person transfers a firearm knowing or having a reasonable cause to believe the person is prohibited from acquiring it. Typically, the offense involves the transfer of a firearm to a convicted felon. *See, e.g., United States v. Dotson*, 570 F.3d 1067 (8th Cir. 2009) (attempting to transfer a firearm to a convicted felon is a violation of section 922(d)(1)); *United States v. Rose*, 522 F.3d 710 (6th Cir. 2008) (selling a firearm to a convicted felon is a violation of §§ 922(d)(1) and 924(a)(2)); *United States v. Peters*, 403 F.3d 1263 (11th Cir. 2005) (same). See also the discussion of 18 U.S.C. § 922(g), prohibiting possession of a firearm by a felon, *infra*. Section 922(d) may also be charged in cases where a firearm purchaser makes a false misrepresentation on Form 4473. Each of the nine circumstances enumerated in section 922(d) are listed on Form 4473 at Questions 11.b.-l. and 12, and the transferee must affirmatively state whether any are applicable. A false answer to a question may result in prosecution under section 922(d).

Section 924(a)(1)(A) may also be charged when a person provides false responses to questions on Form 4473. Examples of recent district court cases include the purchase of a firearm after conviction for a misdemeanor crime of domestic violence, *see United States v. Tooley*, 717 F. Supp. 2d 580 (S.D.W.V. 2010), and counseling another person to falsely state that she was the transferee/buyer of a firearm, *see United States v. Sanelli*, 2010 WL 1608416 (W.D. Va. Apr. 20, 2010). However, as previously noted, case law exists where section 924(a)(1)(A) is charged in "straw purchase" cases. *See United States v. Torres*, 2010 WL 3190659 (D. Ariz. June 21, 2010). It should be noted that the penalty for a violation of section 922(a)(6) is up to ten years imprisonment, while a violation of section 924(a)(1)(A) is up to five years. Charging section 922(a)(6) in lieu of section 924(a)(1)(A) may be based upon the surrounding circumstances or seriousness of conduct in the case.

ii. 18 U.S.C. § 922(g) - Prohibited Persons ("Felon-in-Possession"):

Bans specified classes of people from transporting or possessing in interstate or foreign commerce any firearm or ammunition or from receiving any firearm or ammunition that has been transported in interstate or foreign commerce. The banned classes include: convicted felons; fugitives; unlawful users of controlled substances; adjudicated "mental defectives"; illegal aliens; dishonorably discharged service personnel; those who have renounced their U.S. citizenship; and misdemeanor domestic violence offenders or those subject to certain restraining orders in domestic violence matters. *The statutory maximum penalty for the offense is ten years' imprisonment*.

The **guideline** applicable to section 922(g) offenses is **§2K2.1** (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). *See* USSG Appendix A (Statutory Index).

Issue: Multiplicity in the Charging Instrument:

One set of issues that has arisen since the enactment of section 922(g) relates to multiplicity: what if the defendant is considered a "banned person" under more than one of the categories listed above? In *United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006), the en banc Eighth Circuit held "that Congress intended the 'allowable unit of prosecution' to be an incident of possession regardless of whether a defendant satisfied more than one section 922(g) classification, possessed more than one firearm, or possessed a firearm and ammunition." In so doing, the Eighth Circuit reversed earlier circuit precedent and joined every other circuit to address the issue. For example, in *United States v. Winchester*, 916 F.2d 601 (11th Cir. 1990), the defendant was convicted and sentenced for violations of sections 922(g)(1) (felon in possession) and (g)(2) (fugitive from justice in possession), arising out of the possession of a single firearm. The court found the convictions multiplicitous, concluding that, in enacting section 922(g), it was not within Congress's comprehension or intention that a person could be sentenced, for a single incident, under more than one of the subdivisions of section 922(g). In *United States v. Munoz-Romo*, 989 F.2d 757 (5th Cir. 1993), the Fifth Circuit agreed with *Winchester*. Although the Fifth Circuit had originally upheld multiple sentences under various subsections of section 922(g), defendant filed a petition for writ of certiorari and, in response, the Solicitor General of the United States changed positions and urged that the case be remanded for

dismissal of one of the counts. The Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of the position asserted by the Solicitor General. On remand, the Fifth Circuit concluded that Congress, by rooting all the firearm possession offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon. *Accord United States v. Parker*, 508 F.3d 434, 440 (7th Cir. 2007); *United States v. Dunford*, 148 F.3d 385, 389 (4th Cir. 1998); *United States v. Shea*, 211 F.3d 658, 673 (1st Cir. 2000); *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997).

A related set of issues, to which a similar analysis applies, arises in situations in which a defendant possesses multiple firearms or firearms and ammunition. Most courts have held that possession of more than one firearm and ammunition by a prohibited person generally supports only one conviction under 18 U.S.C. § 922(g). Courts have noted that the prohibited conduct, possession of any firearm or ammunition, could arguably occur every time a disqualified person picks up a firearm even though it is the same firearm or every time a disqualified person picks up a different firearm. "The [statute] does not delineate whether possession of two firearms—say two six-shooters in a holster—constitutes one or two violations, whether the possession of a firearm loaded with one bullet constitutes one or two violations, or whether possession of a six-shooter loaded with six bullets constitutes one or two or seven violations." *United States v. Dunford*, 148 F.3d 385, 389 (4th Cir. 1998) (reversing all but one conviction where defendant possessed six firearms and ammunition). *See also United States v. Olmeda*, 461 F.3d 271, 280 (2d Cir. 2006); *United States v. Keen*, 104 F.3d 1111, 1119-20 (9th Cir. 1997); *United States v. Verrecchia*, 196 F.3d 294, 297-98 (1st Cir. 1999); *United States v. Cunningham*, 145 F.3d 1385, 1398-99 (D.C. Cir. 1998), *United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990); *United States v. Pelusio*, 725 F.2d 161, 168-69 (2d Cir. 1983);*United States v. Valentine*, 706 F.2d 282, 292-94 (10th Cir. 1983); *United States v. Frankenberry*, 696 F.2d 239, 244-45 (3d Cir. 1982); *United States v. Oliver*, 683 F.2d 224, 232-33 (7th Cir. 1982).

However, this general rule is subject to exceptions: where the evidence demonstrates that the defendant stored the weapons in different places or acquired the weapons at different times, he can be convicted of multiple counts of illegal possession. *United States v. Hutching*, 75 F.3d 1453, 1460 (10th Cir. 1996) (sustaining three counts of conviction where one firearm was stored in the defendant's bedroom, one in a car parked in the

garage, and one in another vehicle). *See also United States v. Goodine*, 400 F.3d 202, 209 (4th Cir. 2005); *United States v. Buchmeier*, 255 F.3d 415, 423 (7th Cir. 2001); *United States v. Adams*, 214 F.3d 724, 728 (6th Cir. 2000).

From a procedural standpoint, this general rule does not preclude the *charging* of multiple counts, only convictions. As the Supreme Court in *Ball v. United States* explained: "To say that a convicted felon may be prosecuted simultaneously for violation of [two firearms offenses], however, is not to say that he may be convicted and punished for two offenses." 470 U.S. 856, 861 (1985). Rather, the district court at sentencing may merge the counts of conviction that are duplicative. *See, e.g., United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990) (affirming district court's decision to permit the jury to consider multiple counts, anticipating that if multiplicitous convictions were obtained, it could dismiss counts as necessary).

iii. 18 U.S.C. § 924(c) - Using or Carrying a Firearm During Crime of Violence or Drug Trafficking:

Provides for a fixed mandatory prison term for anyone who uses or carries a firearm during and in relation to any crime of violence or drug trafficking crime, or who possesses a firearm in furtherance of such an offense (in addition to the punishment provided for the crime of violence or drug trafficking crime itself, if charged). For violations of section 924(c), the *mandatory minimum penalty for the basic offense is 5 years*; if the firearm is a short-barreled rifle or shotgun or semiautomatic assault weapon, *10 years*; if a machine gun, destructive device, or firearm equipped with a silencer, *30 years*. For *second or subsequent convictions under section 924(c), the penalty is 25 years*, and if the firearm is a machine gun, etc., life imprisonment without release. These penalties are *consecutive to any other sentence*, such as for the underlying offense. *See* 18 U.S.C. § 924(c). The firearms involved are subject to seizure. *See* 18 U.S.C. § 924(d)(1). There is no defined maximum penalty, although most circuit courts conclude that the implied maximum penalty is life. *See, e.g., United States v. Farmer*, 583 F.3d 131, 151 (2d Cir. 2009); *United States v. Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005); *United States v. Cristobal*, 293 F.3d 134, 147 (4th Cir. 2002); *United States v. Avery*, 295 F.3d 1158, 1170 (10th Cir. 2002); *United States v. Sandoval*, 241 F.3d 549, 551 (7th Cir. 2001); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2001). The Supreme Court also implied as much in *Harris v. United States*, 536 U.S. 545, 574 (2002) and the dissent in that case explicitly referred to "the

statutory maximum of life imprisonment for any violation of § 924(c)(1)(A) . . . ." *Id.* at 574 (Thomas, J., dissenting).

In *United States v. O'Brien*, 130 S. Ct. 2169 (2010), the U.S. Supreme Court held that the nature of the firearm (specifically, if the firearm is a "machinegun") is an element of the offense at section 924(c) to be found by the jury, not a sentencing factor to be found by the judge. The decision resolves a circuit split. Before *O'Brien*, six circuits construed section 924(c) as creating a sentencing issue for the judge. *See United States v. Cassell*, 530 F.3d 1009, 1016-17 (D.C. Cir. 2008); *United States v. Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007); *United States v. Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006); *United States v. Avery*, 295 F.3d 1158, 1169-71 (10th Cir. 2002); *United States v. Harrison*, 272 F.3d 220, 225-26 (4th Cir. 2001); *United States v. Sandoval*, 241 F.3d 549, 550 (7th Cir. 2001). Two construed the statute as creating an element for the jury. *United States v. O'Brien*, 542 F.3d 921, 926 (1st Cir. 2008); *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005). The Court had previously held in *Castillo v. United States*, 530 U.S. 120 (2000), that the machinegun provision in an earlier version of section 924(c) constituted an element of the offense. *O'Brien* arose as the result of a 1998 amendment to section 924(c) that essentially broke a single run-on sentence into subparagraphs. As it did in *Castillo*, the Court in *O'Brien* examined five factors directed at determining congressional intent for the amendment: (1) language and structure in section 924(c), (2) tradition regarding offense elements and sentencing factors, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history. *O'Brien* at 2175. The court determined that section 924c's new structure reflected current practice to make statutes easier to read and that, in light of congressional silence as to the other factors, it was not intended to convert the offense element into a sentencing factor. *Id*. at 2180.

The **guideline** applicable to this statutory provision is **§2K2.4** (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). *See* Appendix A (Statutory Index).

Issue: "During and in relation to" versus "in furtherance of" the particular offenses:

The statute sets out two different relationships between the firearm in question and the underlying crime of violence or drug trafficking offense, depending on whether the defendant (i) used or carried the firearm, or (ii) possessed the firearm. If the defendant *used or carried* the firearm, these acts must only have been done "during and in relation to" the underlying

offense for a violation of the statute to have occurred; if the defendant merely *possessed* the firearm, the possession must have been "in furtherance of" the underlying offense.

A significant body of case law has developed to interpret these two phrases, with the general consensus being that "in furtherance of" requires a closer relationship between the firearm and the underlying offense than "during and in relation to" requires. For example, where the defendant only possessed the firearm and the underlying offense is a drug trafficking offense, the Sixth Circuit held that "[i]n order for the possession to be in furtherance of a drug crime, the firearm must be strategically located so that it is quickly and easily available for use" and that other relevant factors "include whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found." *United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2001) (citing *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)) (affirming conviction where "there was an illegally possessed, loaded, short-barreled shotgun in the living room of the crack house, easily accessible to the defendant and located near the scales and razor blades" and the defendant was found near the weapon in possession of cocaine and a large amount of cash). However, the Ninth Circuit has rejected the use of this list of factors "in closer, and more common, cases" and generally the "checklist" approach. *United States v. Krouse*, 370 F.3d 965, 968 (9th Cir. 2004). Rather, the Ninth Circuit held "that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense." *Id*. (affirming conviction where "[n]o less than five high caliber firearms, plus ammunition, were strategically located within easy reach in a room containing a substantial quantity of drugs and drug trafficking paraphernalia" and "other [uncharged] firearms, which Krouse apparently kept for purposes unrelated to his drug business, . . . were stored elsewhere throughout his home."). In contrast, the Ninth Circuit rejected the claim that possession was in furtherance of a drug trafficking offense where there was no evidence to indicate that the defendant conducted drug trafficking activities in the home where the weapon was found. *United States v. Rios*, 449 F.3d 1009, 1015-16 (9th Cir. 2006).

Seven courts of appeals have decided or assumed without deciding that a defendant who receives firearms in exchange for drugs possesses those firearms "in furtherance of" a drug trafficking offense. *See United States v. Gardner*, 602 F.3d 97 (2d Cir.), *cert. denied*, 130 S. Ct. 3372 (2010); *United States v. Mahan*, 586 F.3d 1185 (9th Cir. 2009); *United States v.*

Sterling, 555 F.3d 452, 458 (5th Cir. 2009); *United States v. Dolliver*, 228 F. App'x 2, 3 (1st Cir. 2007); *United States v. Luke-Sanchez*, 483 F.3d 703, 706 (10th Cir. 2007); *United States v. Boyd*, 209 F. App'x 285, 290 (4th Cir. 2006); *United States v. Frederick*, 406 F.3d 754, 764 (6th Cir. 2005).

With respect to the "during and in relation to" requirement, courts have interpreted this phrase to include a temporal element ("during") as well as a nexus between the firearm and the underlying offense ("in relation to"). The nexus will depend on the particular facts and circumstances of the offenses, but generally the evidence must support a finding that the weapon's presence was not coincidental; that is, simply carrying the firearm during the course of the offense is not sufficient. *United States v. Lampley*, 127 F.3d 1231, 1241 (10th Cir. 1997). Rather, "the evidence must support a finding that the firearm furthered the purpose or effect of the crime . . .." *United States v. McRae*, 156 F.3d 708, 712 (6th Cir. 1998).

Issue: whether a sentence imposed for a separate offense can supplant a § 924(c) sentence under the statute's prefatory clause:

In the recent decision of *Abbott v. United States*, 131 S. Ct. 18 (2010), the U.S. Supreme Court resolved a circuit split concerning whether the "except" clause prefacing section 924(c) exempts an offender from prison time for a section 924(c) conviction when sentenced to a greater mandatory minimum term for a conviction under another statute. Section 924(c) begins: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law," and proceeds to outline minimum sentences. Prior to *Abbott*, several circuits interpreted this language to refer to other minimum sentences that may be imposed for violations of section 924(c), not separate offenses. *See United States v. Abbott,* 574 F.3d 203 (3d Cir. 2009), *aff'd, Abbott v. United States*, 131 S. Ct. 18 (2010); *United States v. London*, 568 F.3d 553 (5th Cir. 2009) (adopting the reasoning of *United States v. Collins*, 205 F. App'x 196 (5th Cir. 2006)); *United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001); *United States v. Jolivette*, 257 F.3d 581, 587 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000). Two circuits held that a defendant is not subject to a section 924(c) minimum sentence if he is subject to a higher minimum sentence, for example as an armed career criminal. *See United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008); *United States v. Almany*, 598 F.3d 238 (6th Cir.), *vacated*, 131 S. Ct. 637 (2010). The Supreme Court granted certiorari in *Abbott* and *Gould* to resolve the issue. In *Abbott*, the Court held that the clause "by any other provision of law" does in fact refer to the conduct section 924(c) proscribes, *i.e.*, possessing a firearm in connection with a predicate crime. The Court

rejected the petitioners' alternative reading that the clause relieved a section 924(c) offender from additional punishment if another, higher mandatory minimum sentence was imposed. The Court concluded that such a reading nullifies the statute's ascending series of minimums at section 924(c)(1)(A)-(C), a result contrary to congressional intent. *See Abbott* at 26-27.

Several circuit courts have held that the district court cannot consider the severity of the mandatory minimum sentence imposed by section 924(c) when sentencing a defendant on a related crime. *See United States v. Williams*, 599 F.3d 831, 834 (8th Cir.), *cert. denied*, 130 S. Ct. 2134 (2010); *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008); *United States v. Roberson*, 474 F.3d 432, 436 (7th Cir. 2007). To reduce the prison term imposed for the underlying count on the ground that the total sentence is too severe conflates the two punishments and thwarts the will of Congress. *See Chavez*, 549 F.3d at 135.

Issue: whether section 924(c) authorizes multiple consecutive firearm possession counts arising out of the same drug trafficking offense:

Most circuits hold that section 924(c) authorizes a conviction if, during the course of an underlying predicate offense, a defendant uses or carries a firearm at any time; in other words the "unit of prosecution" for section 924(c) is the underlying crime, rather than each individual "use" to which firearms are put throughout the duration of the underlying crime. *See United States v. Diaz*, 592 F.3d 467 (3d Cir. 2010); *United States v. Rodriguez*, 525 F.3d 85, 111-12 (1st Cir. 2008); *United States v. Baptiste*, 309 F.3d 274, 278-79 (5th Cir. 2002); *United States v. Anderson*, 59 F.3d 1323 (D.C. Cir. 1995); *United States v. Cappas*, 29 F.3d 1187, 1189-90 (7th Cir. 1994); *United States v. Taylor*, 13 F.3d 986, 992-93 (6th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 676 (2d Cir. 1993); *United States v. Hamilton*, 953 F.2d 1344 (11th Cir. 1992); *United States v. Smith*, 924 F.2d 889, 894-95 (9th Cir. 1991); *United States v. Henning*, 906 F.2d 1392, 1399 (10th Cir. 1990). Two Circuits hold that separate section 924(c) convictions may arise from one predicate offense. *See United States v. Camps*, 32 F.3d 102, 108-09 (4th Cir. 1994); *United States v. Lucas*, 932 F.2d 1210, 1222-23 (8th Cir. 1991).

iv. 22 U.S.C. § 2778 - Exporting Firearms without a Valid Licence

Section 2778 prohibits the exportation (and importation) of designated national defense-related articles (or services) without a valid license to do

so.[5] Section 2778, a provision of the Arms Export Control Act, authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and promulgate regulations therefor. Items designated by the President as defense articles are added to the United States Munitions List (USML).[6] Firearms, including their component parts, and ammunition, along with a wide-range of other defense-related equipment such as military electronics, aircraft and aircraft parts, and night vision equipment, are on the USML. *A violation of section 2778 is punishable by a statutory maximum term of imprisonment of 20 years.*

The **guideline** applicable to a section 2778 offense is **§2M5.2** (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). *See* USSG Appendix A (Statutory Index). Subsection (a)(2) at §2M5.2 provides for Base Offense Level 14 if the offense involved only (A) two or less non-fully automatic small arms (rifles, handguns, or shotguns), (B) 500 or less rounds of ammunition for non-fully automatic small arms, or (C) both.[7] Subsection (a)(1) provides for Base Offense Level 26 if subsection (a)(2) does not apply.

Firearms cases prosecuted under section 2778 involve the exportation, or attempted exportation, of firearms or ammunition across the U.S. border. Frequently the destination in such cases is Mexico, but the firearms may also be destined for other countries. *See, e.g.*, *United States v. Castro-Trevino*, 464 F.3d 536 (5th Cir. 2006) (affirming conviction under section 2778 and sentence under §2M5.2 for attempting to export firearm ammunition to Mexico); *United States v. Galvan-Revuelta*, 958 F.2d 66 (5th Cir. 1992) (same); *United States v. Sero*, 520 F.3d 187 (2d Cir. 2008) (affirming defendant's sentence for shipping firearms parts and ammunition to the Philippines); *United States v. Muthana*, 60 F.3d 1217 (7th Cir. 1995) (exporting ammunition to Yemen).[8]

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[5] Pub. L. No. 94–329, Tit. II (June 30, 1976).

[6] *See* 22 C.F.R. § 121.1.

[7] The Commission in 2011 reduced the number of small arms at §2M5.2(a)(2) from ten to two and added the "ammunition only" provision. *See* USSG App. C, Amend. 753 (Effective November 1, 2011).

[8] Violations of § 2778 that involve defense articles and services other than firearms are outside the scope of this primer. *See, e.g.*, *United States v. Reyes*, 270 F.3d 1158 (7th Cir. 2001)

B. Statutory Sentencing Enhancement

18 U.S.C. § 924(e) - Armed Career Criminal Act of 1984 (ACCA):

This sentencing enhancement imposes a *mandatory minimum 15-year sentence of imprisonment (and a life maximum) for section 922(g) violators who have three previous convictions for a violent felony or serious drug offense*, committed on occasions different from one another. "Violent felony" means any crime punishable by imprisonment for more than one year, that has as an element the use, attempted use, or threatened use of physical force against another; or is burglary, arson, or extortion, involves the use of explosives, or involves other conduct that presents a serious potential risk of physical injury to another. "Serious drug offense" is defined as either certain federal drug offenses with a statutory maximum of ten years or more imprisonment, or state offenses involving manufacturing, distributing, or possessing with intent to manufacture or distribute, with a statutory maximum of ten years or more imprisonment.

The **guideline** implementing this statutory provision is **§4B1.4** (Armed Career Criminal). *See* Appendix A (Statutory Index).

Issue: What is a "violent felony"?:

The definition of the term "violent felony" for purposes of the ACCA has been the subject of an ongoing series of Supreme Court cases, in addition to numerous cases in the lower federal courts. The volume of case law on this issue results primarily from the very general language of the statute and the variety of different state laws to which it must be applied. Although an exhaustive treatment of this issue is beyond the scope of this primer, this section will describe the major Supreme Court cases on the issue and in so doing sketch the general contours of the question.[9]

The first major U.S. Supreme Court case instructing courts how to determine whether a particular prior offense is a "violent felony" was *Taylor v. United States*. 495 U.S. 575 (1990). The Court in that case addressed the question of how to determine whether a particular state

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(exporting aircraft components to Iran).

[9] The Commission's Office of Education and Sentencing Practice has additional training materials on the topics of violent felonies and crimes of violence that are available through the Commission's sentencing helpline.

conviction for an offense called burglary qualifies as a "burglary" for purposes of the ACCA. The Court concluded that, rather than relying on what each individual state law determined was a "burglary," Congress intended a "generic, contemporary meaning of burglary" so that, regardless of what the particular offense was *labeled*, if it had as elements of the offense the same elements of generic, contemporary burglary, it would be considered a "burglary" for ACCA purposes. *Id*. at 598-99. In making this comparison, the Court explained that courts should apply a "formal categorical approach" by which courts would not look to the facts of the particular defendant's offense, but instead look to the elements of the statute under which the defendant was convicted. *Id*. at 600-01. However, the Court described an exception to this general rule: if the state statute is broader than the generic offense, courts could look to other records of the case to see if the jury determined that the defendant had actually committed the generic offense. *Id*. at 602. The Court addressed this modification of the categorical approach in *Shepard v. United States*, 544 U.S. 13 (2005). In that case, the Court held that sentencing courts must look only to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id*. at 26.

Recent U.S. Supreme Court cases have focused on the application of these principles to a different part of the ACCA's "violent felony" definition: the so-called "residual clause." The "residual clause" is the part of the definition that follows the listed offenses such as burglary; it provides that, in addition to the listed offenses, an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" can be considered a "violent felony." In *Begay v. United States*, the Court held that to qualify as a "violent felony" under the residual clause, the prior offense must also be similar to the listed offenses in particular ways: it must be "purposeful, violent, and aggressive" in nature. 553 U.S. 137, 144-45 (2008). There, the Court concluded that prior convictions for driving under the influence did not qualify as violent felonies because the offense of driving under the influence does not meet those criteria. *Id*.

Most recently, the Court interpreted the phrase "physical force" as used in the ACCA's "violent felony" definition in *Johnson v. United States*, 130 S. Ct. 1265 (2010). The Court held that in the context of "violent felony", "physical force" means violent force, "capable of causing physical pain or injury to another []." *Id*. at 1271. Therefore, the Florida felony offense of battery by "[a]ctually and intentionally touch[ing] another person" does not

have as an element the use of physical force and does not constitute a "violent felony" under the ACCA.

Much of the case law on how to determine what constitutes a "violent felony" under the ACCA also applies to determining what constitutes a "crime of violence" under §4B1.2 of the Guidelines, and vice versa. The definition of the term "crime of violence" in §4B1.2 is very similar to the definition of the term "violent felony" in the ACCA, so courts have treated cases defining those terms accordingly. *United States v. Serna*, 309 F.3d 859, 864 (5th Cir. 2002).

II. Firearms Guideline: §2K2.1

A. Generally

The offense level under this guideline is determined principally by the type of firearm in question, the defendant's prior convictions for violent felonies or drug-related felonies, and the defendant's status as a person prohibited by law from possessing firearms (*e.g.*, a convicted felon or an illegal alien), in addition to other offense and offender characteristics, as discussed below. The base offense level ranges from **6** to **26**, depending on which of these characteristics are present.

B. Definitions

The guideline defines "**firearm**" as it is defined in 18 U.S.C. § 921(a)(3): "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device", *but* does not include an "antique firearm."[10] Generally, the circuit courts are in agreement that section 921(a)(3) requires the government only to prove that the firearm in question was designed to fire a projectile, not that the firearm was operable at the time the offense occurred. *See, e.g.*, *United States v. Davis*, 2012 U.S. App. LEXIS 2645 (8th Cir. Feb. 10, 2012) (No. 10-3637); *United States v. Gwyn*, 481 F.3d 849 (D.C. Cir. 2007) (faulty firing pin); *United States v. Rivera*, 415 F.3d 284 (2d Cir. 2005) (firing pin broken; firing pin channel blocked); *United States v. Brown*, 117 F.3d 353

[10] An "antique firearm" is defined at 18 U.S.C. § 921(a)(16) to mean, generally, (A) any firearm manufactured before 1898, (B) a replica of a firearm manufactured before 1898, or (C) a muzzle loading firearm designed to use black powder.

(7th Cir. 1997) (firing pin removed by undercover law enforcement agent); *United States v. Hunter*, 101 F.3d 82 (9th Cir. 1996) (firing pin bent); *United States v. Yannott*, 42 F.3d 999 (6th Cir. 1994) (firing pin broken); *United States v. Ruiz*, 986 F.2d 905 (5th Cir. 1993) (damaged hammer); *United States v. Martinez*, 912 F.2d 419 (10th Cir. 1990) (unloaded firearm); *United States v. York*, 830 F.2d 885 (8th Cir. 1987) (missing firing pin).

The alternative offense levels at §2K2.1(a)(1)(A)(i), (a)(3)(A)(i), and (a)(4)(B)(i)(I) apply if the offense involved a "**semiautomatic firearm that is capable of accepting a large capacity magazine**." As defined in Application Note 2, "a '**semiautomatic firearm that is capable of accepting a large capacity magazine**' means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm", but does *not* mean "a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition." One circuit has found that application of the alternative offense level at §2K2.1(a)(3) is applicable to the possession of an inoperable semiautomatic assault weapon unless the weapon has been rendered permanently inoperable. *See United States v. Davis*, 2012 U.S. App. LEXIS 2645 (8th Cir. Feb. 10, 2012) (No. 10-3637).

A provision of the National Firearms Act (NFA)[11], **26 U.S.C. § 5845(a)**, defines "firearm" for tax purposes, and includes certain shotguns, rifles, machineguns, silencers, destructive devices, and "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any

[11] *See* Pub. L. No. 73–757, 48 Stat. 1236, as amended by the Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1213, 1230.

such weapon which may be readily restored to fire"[12] but does *not* include antique firearms[13] and those found to be "primarily [] collector's item[s]."

The commentary to the guideline defines the term "**crime of violence**" by reference to the definition of that term in the Career Offender guideline, §4B1.2(a) and Application Note 1 of the Commentary to that guideline. Generally, a crime of violence is a felony that has as an element of the offense the use, attempt, or threat of physical force against another person, or "involves conduct that presents a serious potential risk of physical injury to another," and the guideline specifies several offenses that fit in the latter category, including "burglary of a dwelling, arson, or extortion" and offenses that "involve[] use of explosives." A significant body of case law has developed applying these definitions to various prior offenses; for a more detailed discussion of these issues; *see* Section VI.B, infra.

The commentary to the guideline similarly defines the term "**controlled substance offense**" with reference to §4B1.2, which in turn defines the term as any felony violation of a law "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense" the substance. As with "crime of violence," some of the issues surrounding the definition of this term are discussed separately below; *see* Section VI.B, infra.

At 18 U.S.C. §§ 922(g) and (n), referenced in Application Note 3 of §2K2.1, a defendant is a **prohibited person**, for purposes of this section, if he: has been convicted of a crime punishable by more than one year of imprisonment; "is a fugitive from justice"; "is an unlawful user of or addicted to any controlled substance;" "has been adjudicated as a mental defective or . . . has been committed to a mental institution;" is an illegal alien or a non-citizen in the country pursuant to certain types of visas; has been dishonorably discharged from the Armed Forces; has renounced his citizenship; is subject to certain court orders relating to domestic violence; has been convicted of a misdemeanor crime of domestic violence; or is

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[12] *See* 26 U.S.C. § 5845(e).

[13] Like 18 U.S.C. § 921, 26 U.S.C. § 5845(g) defines "antique firearm" to mean, generally, any firearm manufactured before 1898 or a replica of such a firearm. Unlike § 921, a muzzle loading firearm designed to use black powder is not included under § 5845.

under indictment for a crime punishable by imprisonment for a term exceeding one year.

C. Specific offense characteristics

The specific offense characteristics represent various changes to the base offense level described above. A number of common application issues arise when determining whether a particular specific offense characteristic applies.

Multiple Firearms

If a defendant possesses three or more firearms, §2K2.1(b)(1) specifies an increase in the base offense level of two, four, six, eight or ten levels, depending on the number of firearms.

In determining the number of firearms possessed for purposes of this specific offense characteristic, it is important to note that §2K2.1 is listed at §3D1.2(d) and therefore is subject to the provisions of §1B1.3(a)(2). As a result, if a court finds by a preponderance of the evidence that the defendant possessed firearms other than those charged in the indictment that were illegally possessed as a part of the same course of conduct as, or as part of a common scheme or plan with the charged firearm(s), the additional firearms will also be considered in applying §2K2.1(b)(1).

Application Note 5 to this guideline also emphasizes that any firearms *lawfully* possessed by the defendant are *not* counted. Whether a particular firearm is lawfully possessed is a question of federal law; if a firearm is illegally possessed under state law but legal under federal law, it is not counted. *United States v. Ahmad*, 202 F.3d 588 (2d Cir. 2000). Traditional doctrines of constructive possession may apply. *See, e.g., United States v. Houston*, 364 F.3d 243 (5th Cir. 2004) (discussing constructive possession; determining that evidence did not support defendant's constructive possession of firearm found in his wife's purse).

Sporting Purposes or Collection

For certain defendants, a reduction in the offense level is specified where the court finds that the defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition." §2K2.1(b)(2). If the court finds that this provision applies, the offense level is reduced to six. The reduction does not apply, however, to base offense

levels determined under subsections (a)(1) - (a)(5) (offense levels 26 - 18) of §2K2.1. The defendant carries the burden of proving the applicability of this reduction. *United States v. Keller*, 947 F.2d 739 (5th Cir. 1991). A district court's finding is reviewed for clear error on appeal. *See United States v. Massey*, 462 F.3d 843 (8th Cir. 2006). Applicability of the reduction is determined by examining the "surrounding circumstances" including "the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law." §2K2.1(b)(2), comment. (n.6). Selling weapons will not disqualify a defendant from this reduction, "unless the sales are so extensive that the defendant becomes a dealer (a person who trades for profit) rather than a collector (a person who trades for betterment of his holdings)." *United States v. Miller*, 547 F.3d 718, 721 (7th Cir. 2008) (citing *United States v. Clingan*, 254 F.3d 624 (6th Cir. 2001). "Plinking," a form of target shooting for amusement and recreation, can be a sporting purpose under the guidelines. *See United States v. Hanson*, 534 F.3d 1315 (10th Cir. 2008) (citing *United States v. Lewitzke*, 176 F.3d 1022 (7th Cir. 1999); *United States v. Bossinger*, 12 F.3d 28 (3d Cir. 1993)).

If the defendant admits, or the evidence indicates, that he possessed the gun for personal protection, the reduction does not apply as the provision specifies that the firearm must be possessed *solely* for lawful sporting purposes or collection. *United States v. Ramirez-Rios*, 270 F.3d 1185 (8th Cir. 2001); *United States v. Wyckoff*, 918 F.2d 925 (11th Cir. 1990).

Stolen Firearms/Altered or Obliterated Serial Numbers

The Commission recently amended this specific offense characteristic. Prior to November 1, 2006, possession of either stolen firearms or firearms with altered or obliterated serial numbers subjected a defendant to a 2-level enhancement. After Amendment 691, stolen firearms still lead to a 2-level enhancement, but firearms with altered or obliterated serial numbers lead to a 4-level enhancement. Note that a defendant need not have *known* that a firearm he illegally possessed was stolen, *see United States v. Griffiths*, 41 F.3d 844 (2d Cir. 1994) (holding that the lack of a scienter requirement in the stolen firearm enhancement is permissible); *United States v. Mobley*, 956 F.2d 450 (3d Cir. 1992) (same); *U.S. v. Taylor*, 659 F.3d 339, 343-44 (4th Cir. 2011) (same); *United States v. Singleton*, 946 F.2d 23, 26-7 (5th Cir. 1991) (same); *United States v. Murphy*, 96 F.3d 846, 848-49 (6th Cir. 1996) (holding the enhancement does not violate due process despite the

absence of a scienter requirement); *United States v. Schnell*, 982 F.2d 216, 219-22 (7th Cir. 1992) (recounting that the Sentencing Commission intends the enhancement to apply regardless of defendant's knowledge that the firearm is stolen); *United States v. Martinez*, 339 F.3d 759, 761-62 (8th Cir. 2003) (joining other circuits holding the enhancement's lack of a scienter requirement does not raise due process concerns); *United States v. Goodell*, 990 F.2d 497, 499-501 (9th Cir. 1993) (same); *United States v. Sanders*, 990 F.2d 582, 584 (10th Cir. 1993) (same); *United States v. Richardson*, 8 F.3d 769 (11th Cir. 1993) (same); *United States v. Taylor*, 937 F.2d 676, 682 (D.C. Cir. 1991) (same), or had an altered or obliterated serial number, *see United States v. Abernathy*, 83 F.3d 17, 19 (1st Cir. 1996) ("applies 'whether or not the defendant knew'"); *United States v. Williams*, 49 F.3d 92 (2d Cir. 1995) (per curiam) ("Nor is due process offended by strict liability construction of [the enhancement]"); *United States v. Leake*, 396 F. App'x 898, 905 (3d Cir. 2010) (stating that *Kimbrough* does not force a district court to analyze the empirical grounding of the enhancement's lack of a *mens rea* requirement), *cert. denied*, 131 S. Ct. 1541 (2011); *United States v. Perez*, 585 F.3d 880, 883 (5th Cir. 2009) (holding that the enhancement does not require defendant to know the serial number is altered or obliterated); *United States v. Webb*, 403 F.3d 373 (6th Cir. 2005) (same); *United States v. Schnell*, 982 F.2d 216, 219-22 (7th Cir. 1992) (stating absence of the enhancement's scienter requirement does not violate substantive due process); *United States v. Shabazz*, 221 Fed. App'x 529 (9th Cir. 2007) ("[T]he enhancement applies without regard to a defendant's mental state"); *United States v. Carter*, 421 F.3d 909, fn.2 (9th Cir. 2005) (stating the court is mindful that the enhancement applies regardless of the defendant's knowledge); *United States v. McMahon*, 153 F.3d 729 (10th Cir. 1998) (same); *United States v. Starr*, 361 Fed. App'x 60 (11th Cir. 2010) (per curium) (same). The enhancement applies even where partially obliterated serial numbers can be discerned through use of microscopy or other techniques. *See, e.g.*, *United States v. Jones*, 643 F.3d 257 (8th Cir. 2011).

If the defendant steals the firearm in a burglary, the enhancement applies. *United States v. Hurst*, 228 F.3d 751 (6th Cir. 2000). The Ninth Circuit has held that "the phrase 'altered or obliterated' cannot support the contention that a firearm's serial number must be rendered scientifically untraceable for" the provision to apply. *United States v. Carter*, 421 F.3d 909, 916 (9th Cir. 2005). Rather, the court said, the provision applies when the serial number "is materially changed in a way that makes accurate information less accessible." *Id*; *see also United States v. Perez*, 585 F.3d 880 (5th Cir. 2009) (holding that the district court did not err in finding that the serial

number of a firearm was materially changed even though damage to the number did not render it unreadable).

Application Note 8 provides that, if the only offense to which §2K2.1 applies is one of several specified offenses themselves involving stolen firearms or firearms with altered or obliterated serial numbers, the enhancement should not apply, so as to avoid unwarranted double-counting.

Trafficking

The guideline provides a 4-level enhancement if the defendant trafficked in firearms. Application Note 13(A) defines "trafficking" for purposes of this enhancement, requiring two elements: the defendant must have "transported, transferred, or otherwise disposed of two or more firearms to another individual, or received [such] firearms with the intent to [do so]" *and* the defendant must have known or had reason to believe these acts would cause the firearms to be transferred to an individual who either (i) could not legally possess them or (ii) who intended to use or dispose of them unlawfully. *See, e.g., United States v. Garcia*, 635 F.3d 472 (10th Cir. 2011); *United States v. Rivera Juarez*, 626 F.3d 246, 252-53 (5th Cir. 2010) (finding the clandestine nature of the firearms transactions and $200 premium per firearm sufficient to cause reason to believe the weapons were intended for unlawful use (export to Mexican drug cartels) and justified the enhancement).

Application Note 13(C) states that where "the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted." *See, e.g., United States v. Hernandez*, 633 F.3d 370 (5th Cir.) (affirming an upward departure pursuant to §5K2.0 for trafficking 103 firearms to Mexican drug cartels), *cert. denied*, 131 S. Ct. 3006 (2011).

Application Note 13(D) explains that if the defendant both possessed and trafficked three or more firearms, *both* the specific offense characteristics for number of firearms and trafficking would apply.

Firearms Leaving the United States

Prior to 2011, some courts applied §2K2.1(b)(6) to cases in which the defendant transported or attempted to transport firearms across an international border of the United States. Those courts concluded that because transporting a firearm outside the United States is generally a felony under federal law, such conduct may qualify as "another felony

offense" for purposes of subsection (b)(6). *See, e.g.*, *United States v. Juarez*, 626F.3d 246 (5th Cir. 2010) (holding that, under the guideline as amended by the Commission in 2008, the district court did not plainly err in applying §2K2.1(b)(6) to a defendant who transferred firearms with reason to believe they would be taken across the border in a manner that would violate 22 U.S.C. § 2778(b) and (c), which prohibits, among other things, the unlicensed export of defense articles and punishes such violations by up to 20 years' imprisonment).[14]

For clarity, and to promote consistency of application, in 2011 the Commission amended §2K2.1 to add a new prong (A) in subsection (b)(6) that applies "if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States", and redesignated the existing provision as prong (B).[15] Under the amendment, a defendant receives a 4-level enhancement and minimum offense level 18 if either prong applies.

Firearm or Ammunition Possessed "in connection with" Another Offense

Prior to 2006, there was a split among the circuits regarding the interpretation of the "in connection with" requirement of §2K2.1(b)(6)(B).[16] The majority of circuits applied the rule announced by the U.S. Supreme Court in *Smith v. United States*, 508 U.S. 223 (1993), in which the Court interpreted the phrase "in relation to" as it is used in 18 U.S.C. § 924(c)(1); "the firearm must have some purpose or effect with respect to the . . . crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238. *See also United States v. Spurgeon*, 117 F.3d 641 (2d Cir. 1997); *United States v. Wyatt*, 102 F.3d 241 (7th Cir. 1996); *United States v. Nale*, 101 F.3d 1000 (4th Cir. 1996); *United States v. Thompson*, 32 F.3d 1 (1st Cir. 1994); *United States v. Routon*, 25 F.3d 815 (9th Cir. 1994). Other circuits declined to adopt this standard. *United*

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[14] *See* discussion *supra* regarding 22 U.S.C. § 2778 and §2M5.2.

[15] *See* USSG App. C, Amend. 753 (Effective Date: November 1, 2011).

[16] A 2011 amendment redesignated the "in connection with" enhancement at §2K2.1(b)(6) as §2K2.1(b)(6)(B). *See* USSG App. C, Amend. 753 (Effective Date: November 1, 2011).

States v. Regans, 125 F.3d 685 (8th Cir. 1997); *United States v. Condren*, 18 F.3d 1190 (5th Cir. 1994). The Commission resolved the circuit conflict in 2006, adopting the majority position in Amendment 691.

Application Note 14 to §2K2.1 (promulgated in 2006) provides that a firearm or ammunition is possessed "in connection with" an offense if it "facilitated, or had the potential of facilitating" the offense. The enhancement applies equally to firearms and ammunition only cases. *United States v. Coleman*, 627 F.3d 205, 212 (6th Cir. 2010) (affirming the enhancement in an ammunition only case under the "fortress theory," *i.e.*, the firearm or ammunition is to "be used to protect the drugs or otherwise facilitate a drug transaction." *See United States v. Richardson*, 510 F.3d 622, 626 (6th Cir. 2007) *quoting United States v. Ennenga*, 263 F.3d 499, 503 (6th Cir. 2001)), *cert. denied*, 131 S. Ct. 2473 (2011).

Application Note 14 further discusses the "in connection with" requirement when the other offense is burglary, providing that the firearm *is* possessed in connection with a burglary when the defendant finds and takes the firearm in the course of committing the burglary. The defendant need not have used the firearm in any other way in the course of the burglary.

When the other offense is a drug trafficking offense, the application note explains that if "a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia," it is possessed "in connection with" the drug trafficking offense. Courts have interpreted the guideline to mean that, in drug trafficking cases, "[t]he enhancement must be imposed unless it is clearly improbable that [the defendant] possessed the firearm in connection with another felony offense." *United States v. Agee*, 333 F.3d 864, 866 (8th Cir. 2003). In such cases, then, the defendant must demonstrate that it is "clearly improbable" that the required relationship exists in order to avoid the enhancement. (The same rule applies to the enhancement at §2D1.1(b)(1), which provides a 2-level enhancement in drug trafficking cases "[i]f a dangerous weapon (including a firearm) was possessed.")

The Eighth Circuit, however, has recently emphasized one limitation on this rule: in a case in which the defendant was not alleged to have been a drug trafficker or to have carried the drugs and firearm outside his home, and the "other offense" in question was possession of trace amounts of methamphetamine (residue in a baggie), the court reversed the district court's application of the enhancement, concluding that "the mere presence of drug residue . . . and firearms alone is [in]sufficient to prove the 'in connection with' requirement . . . when the 'felony offense' is drug

possession." *United States v. Smith*, 535 F.3d 883, 886 (8th Cir. 2008); *see also United States v. Jeffries*, 587 F.3d 690, 694 (5th Cir. 2009); *cf United States v. Condren*, 18 F.3d 1190, 1197-98 (5th Cir. 1994) (distinguished in *Jeffries* because in *Condren* defendant was involved in drug trafficking).

D. Cross Reference

The cross reference provides for the use of another guideline "if the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense;" and "if the resulting offense level is greater than that determined above." Application Note 14(C) defines "another offense" for purposes of this provision as "any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained." Subsection (c)(1)(A) directs the sentencing court to apply §2X1.1 "in respect to that other offense … ." If death resulted, subsection (c)(1)(B) directs the sentencing court to use the most analogous homicide offense guideline. A circuit conflict has arisen regarding the relationship between the cross reference and §1B1.3; specifically, the question is whether the offense to which the court is referred must be "relevant conduct" to the offense of conviction as that term is used in §1B1.3. Several circuits, including the Third, Sixth, Seventh, Tenth, and Eleventh, have held that the cross reference is limited by §1B1.3. *United States v. Kulick*, 629 F.3d 165, 169 (3d Cir. 2010); *United States v. Settle*, 414 F.3d 629, 633-34 (6th Cir. 2005); *United States v. Jones*, 313 F.3d 1019, 1022 (7th Cir. 2002); *United States v. Jardine*, 364 F.3d 1200, 1209 (10th Cir.), *vacated*, 543 U.S. 1102 (2005), *reinstated in part and remanded on other grounds*, 406 F.3d 1261 (10th Cir. 2005); *United States v. Williams*, 431 F.3d 767, 772 (11th Cir. 2005). The Fifth Circuit, however, has held that the cross reference is not so limited. *United States v. Gonzales*, 996 F.2d 88 (5th Cir. 1993).

The cross reference also applies if the defendant possessed or transferred a firearm "with knowledge or intent" that the firearm would be used or possessed in connection with another offense. Where the cross reference is applied because the defendant knew it would be used or possessed in connection with another offense, the defendant need not have known what specific offense was going to be committed, only that another offense was going to be committed. However, note that while the 4-level enhancement at §2K2.1(b)(6) can apply if the defendant possessed or transferred a

firearm with "reason to believe" that it would be used in connection with another felony offense, the cross reference requires knowledge or intent.

If the cross reference directs the court to a guideline that itself contains a firearm enhancement, courts have generally held that the firearm enhancement should be applied. *See United States v. Webb*, 2012 U.S. App. LEXIS 210 (11th Cir. Jan. 5, 2012) (No. 10-14743); *United States v. Wheelwright*, 918 F.2d 226 (1st Cir. 1990); *United States v. Patterson*, 947 F.2d 635 (2d Cir. 1991). *But see United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992) ("astronomical" increase in defendant's offense level from applying cross reference provisions required remand to district court to consider whether a departure was warranted).

E. Departures

The commentary to the guideline suggests upward departures in several different circumstances. Application Note 7 suggests that, when the offense involves a destructive device, an upward departure may be warranted when "the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created" are not adequately accounted for by the guideline. By way of example, the application note contrasts "a pipe bomb in a populated train station" with "an incendiary device in an isolated area" because the former presents "a substantially greater risk of death or serious bodily injury" than the latter. The application note also references several specific upward departures in chapter 5 that might apply in such cases, including §§5K2.1(Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

Application Note 11 suggests three other circumstances that may warrant an upward departure. The first is where the number of firearms involved in the offense "substantially exceeded 200." The second is where multiple weapons of particular types are involved: specifically, NFA weapons, "military type assault rifles, [and] non-detectable ('plastic') firearms." The third is where the offense involves "large quantities of armor-piercing ammunition."

III. Guideline Enhancements for Firearms Outside §2K2.1

The guidelines provide for increased offense levels through specific offense characteristics that penalize a range of firearm-related conduct.

A. Section 2D1.1(b)(1) - Possession of Firearm During Commission of Drug Offense

In §2D1.1(b), the drug trafficking guideline, two offense levels are added if a firearm was possessed during a drug trafficking offense. These levels are added if a firearm was present unless it is clearly improbable the weapon was connected with the offense. *See* §2D1.1, comment. (n.3).

Section 2D1.1(b)(1) applies where the defendant possesses a firearm in connection with unlawful drug activities. Possession can be actual or constructive, and means the defendant has control or dominion over the firearm. Presence, not use, is the determining factor. *See United States v. Smythe*, 363 F.3d 127, 129 (2d Cir. 2004) ("The [g]uideline is a *per se* rule that does not require a case-by-case determination that firearm possession made a particular transaction more dangerous."); *United States v. Haren*, 952 F.2d 190, 198 (8th Cir. 1991) ("To receive an enhanced sentence, the defendant need not actually have the weapon in hand; constructive possession is sufficient."); *United States v. Keszthelyi*, 308 F.3d 557, 578 (6th Cir. 2002) ("Constructive possession of a firearm is sufficient and may be established by defendant's ownership, dominion, or control over the item itself, or dominion over the premises where the item is located.") (internal citation and quotation marks omitted).

In most circuits, the government must first show the firearm was present when the unlawful activity occurred and prove a nexus between the gun and the activity. The burden then shifts to the defendant to prove it was "clearly improbable" that the weapon had a nexus with the unlawful activity. In conspiracy cases, the reasonable foreseeability that a weapon may be present is enough to prove possession. *United States v. Solorio*, 337 F.3d 580 (6th Cir. 2003) (the government has the initial burden of showing by a preponderance of the evidence that the defendant possessed the firearm; thereafter, the burden shifts to the defendant to demonstrate that it was clearly improbable that the weapon was connected to the offense); *United States v. Salado*, 339 F.3d 285 (5th Cir. 2003) (the government has the burden of proof under §2D1.1 of showing by a preponderance of the evidence that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant); *United States v. Manigan*, 592 F.3d 621, 629 (4th Cir. 2010) (same; "[G]uns found in close proximity to drug activity are presumptively connected to that activity." *(quoting United States v. Corral*, 324 F.3d 866, 873 (7th Cir. 2003))). *United States v. Booker*, 334 F.3d 406 (5th Cir. 2003) (the weapon need not have played an integral role in the offense nor be sufficiently connected with the crime to warrant prosecution as an independent firearm offense); *United States v. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003) (the prosecution does not have to show that the defendant or his co-conspirators actually used the gun in perpetrating the offense or intended to do so); *United*

States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003) (for §2D1.1(b)(1) to apply, the government must demonstrate by a preponderance of the evidence that (i) a weapon was present and (ii) it was not "clearly improbable" that the weapon had a nexus with the conspiracy); *United States v. Drozdowski*, 313 F.3d 819 (3d Cir. 2003) (courts rely on a number of factors in making the "clearly improbable" determination, including: (i) the type of gun involved; (ii) whether the gun was loaded; (iii) whether the gun was stored near the drugs or drug paraphernalia; and (iv) whether the gun was accessible); *United States v. Mendoza*, 341 F.3d 687 (8th Cir. 2003) (constructive possession suffices if it is reasonably foreseeable that a co-conspirator would have possessed a weapon); and *United States v. Topete-Plascencia*, 351 F.3d 454 (10th Cir. 2003) (in a drug conspiracy case, the government is not required to prove that the defendant personally possessed the firearm if the possession of weapons was known to the defendant or reasonably foreseeable to him).

In *United States v. Belitz*, 141 F.3d 815 (8th Cir. 1998), the defendant argued he was not the owner of the gun used to increase his offense level in drug offense. His friend had asked him to repair the gun, and the defendant had it in the room for the friend to pick up. The court found lack of ownership and an innocent reason for possession were irrelevant in determining whether this enhancement applied. The gun was loaded and accessible, and the defendant knew there were drugs in the house. The defendant had not shown that it was clearly improbable that the gun was connected to the drug activity.

B. Section 2B3.1(b)(2) – Robbery

In §2B3.1, the robbery guideline, a specific offense characteristic provides for increases of three to seven offense levels where a firearm or dangerous weapon was involved in the robbery. The particular increase depends on the type of firearm/weapon and the manner in which the defendant involved the firearm; *i.e.,* was a firearm simply possessed during the course of the robbery, or did the defendant use a firearm to threaten or coerce a victim? The different factual scenarios that arise in such cases have presented application issues for the enhancement; some of these are discussed below.

Weapon "Discharged," "Brandished or Possessed" or "Otherwise Used"

In applying the weapon enhancement to a robbery offense, one question is whether the firearm, or the dangerous weapon, was merely "brandished" or whether it was "otherwise used" in the course of the robbery. The general rule is that "brandishing" constitutes an implicit threat that force might be used, while a firearm or dangerous weapon is "otherwise used" when the threat becomes more

explicit. See *United States v. Johnson*, 199 F.3d 123 (3d Cir. 1999). In other words, the difference between "brandishing" and "otherwise used" is a difference based on the seriousness of the charged criminal conduct. *See United States v. Miller*, 206 F.3d 1051, 1053 (11th Cir. 2000). The guideline creates a hierarchy of culpability for varying degrees of involvement during the criminal offense. *See United States v. Wooden*, 169 F.3d 674, 675 (11th Cir. 1999).

The First Circuit has explained the difference between "brandishing" and "otherwise used" by stating that "specifically leveling a cocked firearm at the head or body of a bank teller or customer, ordering them to move or be quiet according to one's direction, is a cessation of 'brandishing' and the commencement of 'otherwise used.'" *See United States v. LaFortune*, 192 F.3d 157, 161-62 (1st Cir. 1999). The Fifth Circuit articulated a similar distinction: "Displaying a weapon without pointing or targeting should be classified as 'brandished,' but pointing the weapon at any individual or group of individuals in a specific manner should be 'otherwise used.'" *See United States v. Dunigan*, 555 F.3d 501, 505 (5th Cir. 2009). Other appellate courts have reached similar conclusions. *See, e.g., United States v. Orr*, 312 F.3d 141 (3d Cir. 2002) (holding a gun to someone's head is sufficient to trigger the enhancement – infliction of physical violence or a verbalized threat is not required to trigger the enhancement); *United States v. Wooden*, 169 F.3d 674, 676 (11th Cir. 1999) (pointing a handgun at the victim's head one-half inch away constituted "otherwise use"); *United States v. Johnson*, 199 F.3d 123 (3d Cir. 1999) (a threat to hit an employee with a baseball bat is sufficient to trigger the enhancement); *United States v. Taylor*, 135 F.3d 478, 482-83 (7th Cir. 1998) (poking a gun into the bank employee's back while directing her to produce money was "otherwise use" of that weapon).

On its face, §2B3.1(b)(2)(E) refers only to weapons that are dangerous; however, the commentary in Application Note 2 directs sentencing courts to impose a 3-level enhancement whenever a harmless object that appears to be a dangerous weapon is brandished, displayed, or possessed by the defendant. In determining whether an enhancement applies under §2B3.1(b)(2)(E), the majority of the circuits apply an objective standard in determining whether an object may be considered a dangerous weapon for the purpose of this sub-section. *See United States v. Hart*, 226 F.3d 602, 606 (7th Cir. 2000); *United States v. Rodriguez*, 301 F.3d 666, 668 (6th Cir. 2002); *United States v. Dixon*, 982 F.2d 116, 124 (3d Cir. 1992); *United States v. Taylor*, 960 F.2d 115, 116 (9th Cir. 1992); *but see United States v. Bates*, 213 F.3d 1336 (11th Cir. 2000) (relying on the intent of the perpetrator and the subjective perception of the teller). In other words, the ultimate inquiry is whether a reasonable individual would believe that the object is a dangerous weapon under the circumstances.

The Sixth Circuit applied this enhancement where a defendant brought a Styrofoam sandwich box into a bank asserting it was a bomb. *See United States v. Rodriguez*, 301 F.3d 666, 669 (6th Cir. 2002). In arriving at its conclusion, the Sixth Circuit relied on the Seventh Circuit's holding in *United States v. Hart*, 226 F.3d 602 (7th Cir. 2000) where the court upheld a §2B3.1(b)(2)(E) enhancement when the defendant robbed multiple banks by claiming in each instance that he was carrying a bomb in a box, including a lunch box on one occasion and a shoe box that was wrapped inside a bag on another - none of the boxes in fact contained an explosive device.

The Fourth Circuit, joining the Third and Eleventh Circuits, held that a concealed hand may serve as an object that appears to be a dangerous weapon, and therefore trigger a §2B3.1(b)(2)(E) enhancement. *See United States v. Davis,* 635 F.3d 1222 (D.C. Cir. 2011) (deciding that a hand concealed in a backpack creates the appearance of a dangerous weapon); *United States v. Souther*, 221 F.3d 626, 628-29 (4th Cir. 2000) (holding a concealed hand appeared to be a dangerous weapon because defendant presented a note stating he had a gun); *United States v. Vincent*, 121 F.3d 1451, 1455 (11th Cir. 1997) (stating concealed hand appeared to be a dangerous weapon because it was pressed into the victim's side); *United States v. Dixon*, 982 F.2d 116, 121-124 (3d Cir. 1992) (noting the concealed hand appeared to be a dangerous weapon because it was draped with a towel).

By contrast, the Eighth Circuit concluded that a §2B3.1(b)(2)(E) enhancement was inapplicable where a defendant concealed an inoperable replica of a gun, which was possessed during the commission of a robbery, but never used in any way. *United States v. Hutton*, 252 F.3d 1013, 1017 (8th Cir. 2001). The court noted that the only reason it knew the defendant had an inoperable replica gun was because he admitted it to the police; therefore, not only did the defendant lack the actual ability to harm anyone during the robbery, but no one knew he had on his person an object that might have appeared to be dangerous. *Id.* Accordingly, a §2B3.1(b)(2)(E) enhancement was inappropriate.

If a "Threat of Death" was Made

Prior to the 1997 amendment of this guideline, there was a split among the circuits as to what constituted an "express threat of death." This issue arose when the courts were confronted with a robbery where the defendant would either hand a note stating "I have a gun," or he would state "I have a gun." The majority of the circuits held that the defendant need not have expressed in words or actions an intention "to kill," provided the words or actions employed were such as to place the victim in objectively reasonable fear for his or her life. On the other hand, the Sixth and Eleventh Circuits held that the term "express" contemplated nothing less than the defendant unambiguously declaring, either through words or unambiguous

conduct, that he intended to kill the victim. *See United States v. Alexander*, 88 F.3d 427 (6th Cir. 1996); *United States v. Moore*, 6 F.3d 715 (11th Cir. 1993).

Effective November 1, 1997, the Commission resolved this conflict by deleting the word "express" and requiring only a "threat of death." *See* USSG Appendix C, Amendment 552 (1997). The amendment adopted the "majority appellate view which holds that the enhancement applies when the combination of the defendant's actions and words would instill in a reasonable person in the position of the immediate victim a greater amount of fear than necessary to commit the robbery." *Id.* The deletion of the term "express" from §2B3.1(b)(2)(F) broadened the application of this enhancement. *See United States v. Soto-Martinez*, 317 F.3d 477, 479 (5th Cir. 2003); *United States v. Day*, 272 F.3d 216 (3d Cir. 2001).

Since the 1997 amendment, all circuits agree that the statement "I have a gun" constitutes a "threat of death," and qualifies for a 2-level enhancement even though no express threat to use a gun is made. The Sixth and Eleventh Circuits have acknowledged that their pre-amendment interpretations of §2B3.1(b)(2)(F) are no longer good law. *See United States v. Winbush*, 296 F.3d 442 (6th Cir. 2002); *United States v. Murphy*, 306 F.3d 1087, 1090 (11th Cir. 2002).

C. Section 2B5.1 – Offenses Involving Counterfeit Bearer Obligations of the U.S.

In §2B5.1, the counterfeiting bearer obligations guideline, two offense levels are added if a firearm is used in connection with the offense. If the resulting offense level is less than 13, it is increased to level 13. Bearer obligations include currency and coins, food and postage stamps, and other items generally described as bearer obligations of the United States. *See* §2B5.1, comment. (n.2).

The Third Circuit applied this firearm enhancement in *United States. v. Gregory*, 345 F.3d 225 (3d Cir. 2003). In *Gregory*, the defendant claimed he forgot about a gun in his jacket pocket when he passed counterfeit currency. The district court applied the firearm enhancement under §2B5.1(b)(4), stating prior circuit case law mandated it. *See United States v. Loney*, 219 F.3d 281 (3d Cir. 2000) (affirming the firearm enhancement under §2K2.1(b)(5) where court found a connection between illicit drugs and the loaded firearm the defendant possessed). The defendant argued the district court must first resolve the factual dispute over whether he possessed the handgun "in connection with" the instant offense. The appeals court stated that for the purposes of §2B5.1 a causal, logical, or other type of relationship must exist between the firearm and instant offense to apply the enhancement. The case was remanded to make this determination.

IV. Standard of Proof

A. Statutes

Guilt on the statutory offenses must be established by guilty plea or by a verdict "beyond a reasonable doubt." Section 924(e) is a mandatory sentencing enhancement that does not have to be charged. In contrast, section 924(c) describes an offense that must be charged, not a mere sentencing enhancement.

B. Guidelines

The particular showing that must be made with respect to each specific offense characteristic varies, but like all sentencing factors, the standard of proof is a preponderance of the evidence.

C. Codefendant or Co-conspirator Liability

In practice, defendants are not usually held accountable under section 924(c) for firearms that they did not personally use or carry, although there is no legal impediment to holding them criminally liable under the law of conspiracy for an accomplice's foreseeable use or possession of a firearm during the conspiracy to commit the crime of violence or drug trafficking crime. *See*, *e.g.*, *United States v. Shea*, 150 F.3d 44 (1st Cir. 1998) (*recognized as abrogated on other grounds*, *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000)); *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998); *United States v. Washington*, 106 F.3d 983 (D.C. Cir. 1997); *United States v. Masotto*, 73 F.3d 1233 (2d Cir. 1996); *United States v. Myers*, 102 F.3d 227 (6th Cir. 1996); *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995); *United States v. Washington*, 106 F.3d 1488 (9th Cir. 1997). By contrast, under the guidelines, courts are required to apply the specific offense characteristics based on a defendant's relevant conduct, which generally includes all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity.

V. Application Issues related to 18 U.S.C. § 924(c)

A. Interaction of firearms enhancements and section 924(c)

No defendant receives both a guideline enhancement for firearms and the mandatory consecutive sentence for section 924(c) based on the same firearm, as the guideline specifically directs that the specific offense characteristics for firearms not be applied when the defendant is convicted of a section 924(c) violation. *See* §2K2.4, comment. (n.4). Courts have held that this note plainly prohibits an enhancement for possession of any firearm–whether it be the one

directly involved in the underlying offense or another firearm, even one in a different location. "If the court imposes a sentence for a drug offense along with a consecutive sentence under 18 U.S.C. § 924(c) based on that drug offense, it simply cannot enhance the sentence for the drug offense for possession of any firearm." *See United States v. Knobloch*, 131 F.3d 366 (3d Cir. 1997). The same prohibition applies to fake firearms. *See United States v. Eubanks*, 593 F.3d 645, 649-650 (7th Cir. 2010) (remanding for resentencing because the enhancement at §2B3.1(b)(2)(D) is not applicable to a "plastic B.B. gun"). And the death threat enhancement is inapplicable when related to the firearm that forms the basis of a section 924(c) sentence. *See United States v. Katalinic*, 510 F.3d 744, 748 (7th Cir. 2007) (joining the Fourth and Sixth Circuit holding the same). *See also United States v. Reevey*, 364 F.3d 151, 158-159 (4th Cir. 2004); *United States v. Hazelwood*, 398 F.3d 792, 798-800 (6th Cir. 2005).

Before the Commission's 2000 amendment cycle, some courts added the enhancement in addition to the section 924(c) sentence where defendant had multiple firearms or when a codefendant also possessed a firearm. *See, e.g., United States v. Willett*, 90 F.3d 404, 408 (9th Cir. 1996) (2-level enhancement on top of the section 924(c)(1) conviction proper where defendant committed drug trafficking offense with multiple weapons); *United States v. Washington*, 44 F.3d 1271, 1280-81 (5th Cir. 1995) (enhancement on top of section 924(c) conviction proper where accomplice in the crime had another gun); *accord, United States v. Kimmons*, 965 F.2d 1001, 1011 (11th Cir. 1992), *cert. granted, judgment vacated on other grounds*, 508 U.S. 902 (1993). However, Amendment 599 changed the language in Application Note 4 to §2K2.4 to clarify that this application was not what the Commission intended, and courts have recognized that this addition is improper. *See, e.g., United States v. Aquino*, 242 F.3d 859, 864-65 (9th Cir. 2001).

B. Offenses under Section 924(c) and Grouping

Because 18 U.S.C. § 924(c) requires that any sentence imposed under that statue run consecutive to any other sentence imposed, 18 U.S.C. § 924(c) counts may not group with any other count charged. This is reflected in the guidelines at §5G1.2(a), which provides that sentences for such offenses "shall be determined by that statute and imposed independently." Note that this does not preclude other counts impacted by the section 924(c) count from grouping; *i.e.*, if a firearms enhancement in a guideline like §2D1.1 that would otherwise be applicable is not applied due to the presence of the section 924(c) count, the §2D1.1 count could still group with other, non-section 924(c) counts.

VI. Crimes of violence and drug trafficking offenses as prior offenses

As noted in the discussion of §2K2.1 *supra*, that guideline incorporates by reference the definitions of the terms "crime of violence" and "drug trafficking offense" from §4B1.2, the Career Offender guideline. Although a thorough treatment of all the case law surrounding these definitions is beyond the scope of this primer, the following sections describe some basic concepts and issues that arise in applying these definitions.

A. Relationship to Other Guideline and Statutory Definitions of the Terms

As noted in Section I.B of this primer, there is a close relationship between the definition of the term "violent felony" as that term is used in the ACCA and the term "crime of violence" as that term is used in §4B1.2. When applying these definitions, it is important to be aware that there are other uses of the term "crime of violence" in other parts of the guidelines and the U.S. Code, so careful attention to the particular definition being analyzed is particularly important. For example, 18 U.S.C. § 16 defines the term "crime of violence" in a way that is different from the guidelines' definition of the term in §4B1.2, although many of the same offenses are treated similarly under each definition. Additionally, Application Note 1(B)(iii) to §2L1.2 of the guidelines defines the term "crime of violence" for purposes of that guideline's specific offense characteristics. A similar situation exists with respect to the definitions of "drug trafficking offense" and "controlled substance offense" under various statutes and guidelines, so similar attention must be paid when applying those definitions.

B. Definitions in §4B1.2

Crime of violence

For any offense to qualify as a crime of violence under §4B1.2, it must have been "punishable by a term of imprisonment exceeding one year." The term "punishable" signifies that the defendant himself need not have received a sentence in excess of one year; rather, the particular statute of conviction must have carried a possible penalty of greater than one year. The conviction may be under state or federal law.

The definition encompasses two basic types of offenses. One type is an offense that has as an *element* of the offense "the use, attempted use, or threatened use of physical force against the person of another." These may be, for example, robbery offenses that are defined as taking property from the person of another using physical force. The second type are the offenses of "burglary of a dwelling, arson,

or extortion, [offenses that] involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another."

The categorical approach described at Section I.B above applies to determinations of crimes of violence as well.

Application Note 1 provides that the offense of unlawful possession of a firearm by a felon *does not* qualify as a crime of violence unless the firearm is an NFA firearm (as described in Section II.B above).

Application Note 1 also provides that convictions for aiding and abetting, conspiring, and attempting to commit crimes of violence are themselves crimes of violence.

Controlled substance offense

A controlled substance offense under §4B1.2, like a crime of violence, must be punishable by a term of imprisonment of more than one year, and may be a violation of state or federal law.

Two basic types of drug offenses qualify: those that involve "the manufacture, import, export, distribution or dispensing" of drugs (or a counterfeit substance), and those that involve possession with "intent to manufacture, import, export, distribute or dispense" the drugs (or a counterfeit substance).

Again, the categorical approach described at Section I.B above applies.

Application Note 1 provides that convictions for aiding and abetting, conspiring, and attempting to commit controlled substance offenses are themselves controlled substance offenses.